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PRE-APPEAL BRIEF REQUEST FOR REVIEW		Docket Number (Optional) 07781.0157-00000	
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		First Named Inventor Knut Heusermann, et al.	
		Art Unit 2167	Examiner Kuen S. Lu

Applicant requests review of the final rejection in the above-identified application. No amendments are being filed with this request.

This request is being filed with a notice of appeal.

The review is requested for the reason(s) stated on the attached sheet(s).
 Note: No more than five (5) pages may be provided.

I am the

☐ applicant/inventor.

☐ assignee of record of the entire interest.
 See 37 CFR 3.71. Statement under 37 CFR 3.73(b) is enclosed.

☒ attorney or agent of record. **Aaron J. Capron**
 Registration number 56,170

☐ attorney or agent acting under 37 CFR 1.34.
 Registration number if acting under 37 CFR 1.34 _____

Signature

Typed or printed name

(650) 849-6680
Telephone number

8/11/07
Date

NOTE: Signatures of all the inventors or assignees of record of the entire interest or their representative(s) are required. Submit multiple forms if more than one signature is required, see below*.

☒ *Total of 1 form is submitted.

This collection of information is required by 35 U.S.C. 132. The information is required to obtain or retain a benefit by the public which is to file (and by the USPTO to process) an application. Confidentiality is governed by 35 U.S.C. 122 and 37 CFR 1.11, 1.14 and 41.6. This collection is estimated to take 12 minutes to complete, including gathering, preparing, and submitting the completed application form to the USPTO. Time will vary depending upon the individual case. Any comments on the amount of time you require to complete this form and/or suggestions for reducing this burden, should be sent to the Chief Information Officer, U.S. Patent and Trademark Office, U.S. Department of Commerce, P.O. Box 1450, Alexandria, VA 22313-1450. DO NOT SEND FEES OR COMPLETED FORMS TO THIS ADDRESS. SEND TO: Mail Stop AF, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.

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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES**

In re Application of:)	
)	
Knut HEUSERMANN et al.)	Group Art Unit: 2167
)	
Application No.: 10/800,311)	Examiner: Kuen S. LU
)	
Filed: March 12, 2004)	Confirmation No.: 1748
)	
For: MANAGEMENT OF INBOUND)	Mail Stop AF
CONFLICTS WHEN MERGING)	
DATA OF DISTRIBUTED)	
SYSTEMS)	

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PRE-APPEAL BRIEF REASONS FOR REQUEST FOR REVIEW

Sir:

Applicants request a pre-appeal brief review of the Final Office Action dated May 16, 2007 ("Final Office Action"). This Request is being filed concurrently with a Notice of Appeal and a Pre-Appeal Brief Request for Review.

I. Requirements for Submitting a Pre-Appeal Brief Request for Review

Applicants have met each of the requirements for a pre-appeal brief review of rejections set forth in an Office Action. The application has been at least twice rejected. Applicants have filed a Notice of Appeal with this Request, and have not yet filed an Appeal Brief. Lastly, Applicants submit a Pre-Appeal Brief Request for Review that is five (5) or less pages in length and sets forth legal or factual deficiencies in the rejections. See Official Gazette Notice, July 12, 2005. Therefore, Applicants request review of the Examiner's rejections in the Final Office Action for the following reasons.

II. Examiner's Rejection of Claims 1-37 by Using Erickson, Archibald, and Chen Is Clearly Erroneous

The Examiner rejected claims 1- 37 under 35 U.S.C. § 103(a) as being unpatentable over U.S. Patent No. 6,892,210 ("Erickson") in view of U.S. Patent No. 6,918,006 ("Archibald") and U.S. Patent No. 6,993,522 ("Chen"). Applicants respectfully traverse the rejection.

Claim 1 recites "comparing at least one data package of the first data object with at least one data package of the copy of the first data object sent by the second system using a consistency check operation stored within the first data object, the second data object, or the copy of the first data object" (emphasis added). Independent claims 13, 25, and 37 provide similar language. According to this claim language, the at least one data package of the copy of the first data object is "sent" by the second system.

According to the Examiner, Erickson provides "comparing at least data package of the first data object with at least one data package of the copy of the first data object sent by the second system" at col. 19, lines 55-65. Final Office Action at pages 3-4. Erickson, however, describes a Sync Object Processor 14 subprogram that resolves any conflict that may have arisen due to a change in the Sync Record. Erickson at col. 10, lines 39-45 [10:39-45]. This Sync Object Processor 14 is part of the Sync Agent 1, which is provided to a plurality of computers who desire to share and manage specific records within a plurality of databases. *Id.* at FIGS. 1A-B and 4:58-65. In other words, the Sync Agent 1, along with the Sync Object Processor 14, are provided to the plurality of computers before any data is transferred. Accordingly, as acknowledged by the Examiner, Erickson fails to disclose, teach, or suggest "comparing at least one data package of the first data object with at least one data package of the copy of the first data object sent by the second system using a consistency check operation stored within the first data object, the second data object, or the copy of the first data object" (emphasis added). Final Office Action at page 4.

As the Examiner acknowledges, Erickson also does not teach "a consistency check operation stored within the first data object, the second data object, or the copy of the first data object." For this element, the Examiner looks to Archibald and states that "Archibald [] teaches performing data consistency check of parity data inconsistencies

during data operations.” Final Office Action at page 4. Archibald provides a system for coordinating the execution of one or more data management operations on a data storage sub-system. Archibald at 1:8-12. These data storage management operations include independent operations operating on user data and/or metadata. *Id.* at 1:15-17. One of these operations can include data consistency checks, stored in memory 107, to be provided on the data storage sub-system. *Id.* at FIG. 2 and 1:17-20. But Archibald only discloses that the data consistency check is stored in a memory 107—not a first data object, the second data object, or the copy of the first data object, as recited in claim 1, 13, 25, and 37. Therefore, like Erickson, Archibald fails to disclose “comparing at least one data package of the first data object with at least one data package of the copy of the first data object sent by the second system using a consistency check operation stored within the first data object, the second data object, or the copy of the first data object” (emphasis added).

Further, the Examiner may argue that the combination of Erickson and Archibald suggests the “consistency check operation stored within the first data object, the second data object, or the copy of the first data object,” but Applicants disagree. Erickson, in fact, teaches away from this combination because it clearly discloses that the Sync Object Processor 14, used for resolving any conflicts between data, is stored on the computer before any data is transferred.

Chen also fails to overcome the deficiencies of Erickson and Archibald. Chen is directed to synchronizing data between mobile devices and fixed devices. Chen provides this synchronization on synchronization server 340. But, like Erickson and Archibald, Chen fails to teach or suggest a “consistency check operation stored within the first data object, the second data object, or the copy of the first data object.” Therefore, Erickson in view of Archibald and Chen fails to teach or suggest “comparing at least one data package of the first data object with at least one data package of the copy of the first data object sent by the second system using a consistency check operation stored within the first data object, the second data object, or the copy of the first data object” (emphasis added). Accordingly, Applicants respectfully submit that claim 1 is patentable over the cited prior art.

Claims 13, 25, and 37 provide language similar to the language of claim 1. For at least the reasons provided above, Applicants respectfully submit that claims 13, 25, and 37 are patentable over the cited prior art.

Claims 2-12, 14-24, and 26-36 depend on claims 1, 13, and 25, respectively, and are patentable for at least the same reasons as claims 1, 13, and 25.

III. Final Office Action Is Premature

If the Examiner is not persuaded by the analysis provided above, Applicants respectfully submit that the Final Office Action is premature. MPEP § 706.07(a) states that "[a] second or any subsequent actions on the merits shall be final, except where the examiner introduces a new ground of rejection that is neither necessitated by applicant's amendment of the claims nor based on information submitted in an information disclosure statement filed during the period set forth in 37 CFR 1.97(c) with the fee set forth in 37 CFR 1.17(p).

In this case, the Examiner indicated that the Office Action dated May 16, 2007, is a Final Office Action. Applicants respectfully submit that the Finality of the Office Action is premature in this case because the Examiner had the opportunity to reject the claimed subject matter over Erickson in view of Archibald in a previous Office Action and yet had failed to do so. Specifically, the Examiner has modified his rejection regarding the un-amended claim limitation "comparing at least one data package of the first data object with at least one data package of the copy of the first data object sent by the second system using a consistency check operation stored within the first data object, the second data object, or the copy of the first data object" ("subject matter at issue"), as recited in claim 1 or similarly provided in claims 13, 25, and 37.

In the previous Office Action dated 12/21/06, the Examiner indicated that claims 1, 5, 9, 10, 13, 17, 21, 22, 25, 29, 33, 34, and 37 were obvious over Erickson alone. Because believing that the Examiner's rejection was insufficient at least to subject matter at issue of claims 1, 13, 25, and 37, Applicants traversed the Examiner's rejection and argued that the subject matter at issue was patentable over Erickson because Erickson taught away from the subject matter at issue, which the Examiner alleged was an obvious variation. Apparently, the Examiner agreed with the Applicants'

position because the Examiner provided Erickson in view of Archibald as a new ground for rejecting the subject matter at issue of claims 1, 13, 25, and 37.


Applicants submit that the Examiner previously had the opportunity to reject the subject matter at issue of claims 1, 13, 25, and 37 using Erickson in view of Archibald, but did not. Therefore, Applicants respectfully submit that the Final Office Action is premature because the Examiner introduced a new ground for rejection that was not necessitated by Applicants' amending the independent claims. As noted in the Response to Office Action dated 03/19/07 ("Response"), the amendment to the claims were necessitated only by the Examiner's objections, § 112 rejections, and § 101 rejections and were not for the purposes of overcoming the prior art. Response at page 12. Applicants respectfully submit that the remarks within the Response are consistent with the amendments. Therefore, Applicants respectfully request that the finality of the Office Action be removed.

IV. Conclusion

For at least the foregoing reasons, Applicants respectfully submit that claims 1-37 are patentable over the cited prior art. Please grant any extensions of time required to enter this response and charge any additional required fees to our Deposit Account No. 06-0916.

Respectfully submitted,
FINNEGAN, HENDERSON, FARABOW,
GARRETT & DUNNER, L.L.P.

Dated: August 16, 2007

By: 
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